

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:LM:FSH:MAN:TL-N-1952-01  
MBalachandran

date:

to: Cirel S. Cohen, Territory Manager, Territory 4, Manhattan  
Attn: Revenue Agent Mitch Halper, Area 2, Group 4

from: Area Counsel (LMSB:FSH)

subject: Forms SS-10 for [REDACTED] and [REDACTED]  
[REDACTED].

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00  
6501.08-10  
6501.08-17

EIN Nos. [REDACTED] ([REDACTED])  
[REDACTED] ([REDACTED])

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This advice is subject to 10 day post review by the National Office. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice. Since the expiration of the statute of limitations is imminent, we will request the

National Office to consider this proposed advice on an expedited basis.

### INTRODUCTION

██████████ has signed two Forms SS-10, one for the ██████████ and the other for a subsidiary, the ██████████ (collectively, "the taxpayer"). ██████████'s title is stated on both SS-10s as "authorized signatory." He is an employee of ██████████ or its subsidiaries. He is not an officer of either corporation although he is named in an memorandum naming authorized signatories for tax documentation. You have asked us to advise you whether ██████████'s signature creates a valid waiver of the statute of limitations to assess employment taxes for the period ██████████ to ██████████ for the two corporations.

### ISSUES

- 1) Who has the authority to sign a Form SS-10 to validly extend the time to assess employment taxes against a corporation?
- 2) Can a corporation create a power of authority to execute a waiver of the statute of limitations without utilizing a Form 2848?

### CONCLUSION

- 1) A corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act.
- 2) A corporation may designate an attorney-in-fact to consent to a waiver without using a form 2848 but the designation should generally meet the specific requirements in Treasury Regulations §§ 601.501 et seq. Because it appears that those requirements are not met in this case, ██████████ may not be authorized under the regulations to execute Forms SS-10 on behalf of the two corporations.<sup>1</sup>

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<sup>1</sup> If the Service were to rely on the Forms SS-10 executed by ██████████ and the taxpayer argued that the waivers were invalid, under the circumstances here present, it is possible for the Service to make a collateral estoppel argument concerning the validity of the previously signed statute extensions. However, the burden of proof with respect to such a collateral estoppel argument in Tax Court is upon the Service. See, e.g., Piarulle v.

## FACTS

The [REDACTED]<sup>2</sup> ("[REDACTED]") is a Delaware corporation. The [REDACTED] ("[REDACTED]") is a New York corporation. The [REDACTED] is the parent corporation of [REDACTED].

Paragraph [REDACTED] of the [REDACTED] By-Laws of the [REDACTED] as Amended and Restated (the "By-Laws") states in part that the "Chief Financial Officer shall have the power to sign all certificates, contracts, obligations and other instruments of the corporation." Paragraph [REDACTED] of the By-Laws titled "Contracts" states that:

Any officer having the power to sign certificates, contracts, obligations and other instruments of the Corporation may delegate such power to any other officer or employee of the Corporation, provided that the officer having delegated such power shall be accountable for the actions of such other officer or employee. (Emphasis in original.)

In a [REDACTED] memorandum ("the memorandum") the Chief Financial Officer of the [REDACTED] states that:

I hereby delegate the responsibility for signing tax returns and related documents to the individuals listed below. I hereby appoint them as Authorized Signatories for the purposes of signing and filing tax returns and related documents on behalf of the Corporation and its subsidiaries and affiliates.

These individuals are current employees of the Corporation or its subsidiaries. They shall continue to serve as Authorized Signatories for the purposes described herein for the duration of their employment by the Corporation or its subsidiaries or until the Corporation or the Chief Financial Officer delivers written notice revoking their authority.

The memorandum then names [REDACTED] individuals, including [REDACTED], as authorized signatories.

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Commissioner, 80 T.C. 1035 (1983).

<sup>2</sup> On [REDACTED], the [REDACTED] filed a certificate of amendment with the Delaware Secretary of State changing its name to the [REDACTED]. That name change is reflected in the caption to the proposed Form SS-10.

You are examining the employment tax returns of the [REDACTED] for [REDACTED]. You have advised us that the statute of limitations on assessment for the [REDACTED] Form 941 for each corporation will expire on [REDACTED]. Accordingly, the [REDACTED] each executed a Form SS-10 Consent to Extend the Time to Assess Employment Taxes. Both forms were signed on [REDACTED] by [REDACTED] in the space designated for the signature of a corporate officer. [REDACTED] is an employee of [REDACTED] or its subsidiaries but not an officer of either corporation. The forms list [REDACTED]'s title as "authorized signatory." The forms have not been signed on behalf of the Commissioner.

We have been advised that in prior audit cycles, the Service has relied on similar statute extensions signed by [REDACTED] and that assessments have been made based on those extensions. It is our understanding that neither the Service nor the taxpayer has previously contested the validity of those statute extensions executed by [REDACTED].

#### DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the extension, and IRM 121.22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

#### Extension of Statute of Limitations

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). However, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. I.R.C. 6501(c)(4). For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

### Consolidated Group

Unlike the income tax liability of a consolidated group, where, as a general rule, the common parent acts as sole agent for each member of the group, each member of a consolidated group must act on its own behalf with respect to its own employment tax liabilities. See I.R.C. § 1501 and the regulations thereunder. Each member is, therefore, responsible for entering into its own consent to extend the statute of limitations with respect to its employment tax liabilities.

### Officer to Execute the Form SS-10

Unless properly designated as an attorney-in-fact for the taxpayer, [REDACTED] may not be authorized to consent to a waiver on Form SS-10.<sup>3</sup> The Form SS-10 should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the [REDACTED] and [REDACTED]. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

As Rev. Rul. 83-41 explains, the "regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service will generally apply the rules applicable to execution of the original returns to consents to the extension of time to make an assessment." I.R.C. § 6062 lists the following as authorized to sign a corporate tax return: the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation.

Given the statutory basis for the Service's position on who may validly execute consents, any deviation from the listed persons must also have independent legal authority. That independent legal authority can arise from a designation of an individual as an attorney-in-fact or an agent of a corporation properly authorized to consent to a waiver of restriction on assessment. Treas. Reg. § 601.504(a).

### Attorney-in-fact

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<sup>3</sup> See footnote 1 above.

Generally, a corporation can appoint a corporate agent<sup>4</sup> to act on its behalf. See 2 William Meade Fletcher Et Al., Fletcher Cyclopedia of the Law of Private Corporations, § 295 (perm. ed. rev. vol. 1990). Corporate agents are generally appointed by the board of directors or by some corporate officer with authority so to do. Id. In our case, the power to appoint an agent is granted by the provisions in the By-Laws and the Memorandum quoted above. Thus, the taxpayer's position is apparently that [REDACTED]'s signature on the SS-10s is pursuant to the actual authority in the By-Laws and the Memorandum and therefore valid as the signature of an attorney-in-fact or a recognized representative.

However, the documents used by the taxpayer to designate [REDACTED] as an attorney-in-fact or a recognized representative do not appear to fully meet the Treasury Regulations' specifications to effect such a designation. Under the regulations, a recognized representative is an individual who is (i) appointed as an attorney-in-fact under a power of attorney and (ii) a member of certain categories, one of which is an employee of a corporation. Treas. Reg. § 601.502(a).

It is not clear whether [REDACTED] is an employee of the [REDACTED] or both. [REDACTED] would meet the second requirement of Treasury Regulation § 601.502(a) for the corporation(s) of which he is an employee.

Even if the second requirement of Treasury Regulation § 601.502(a) is met by clarifying [REDACTED]'s employer, the first requirement may not be met because the taxpayer has not provided a power of attorney designation that appears to fully meet the requirements listed in Treas. Reg. § 601.503. While the By-Laws together with the memorandum meet some of the requirements listed in Treasury Regulation § 601.503, they do not provide a description of the type of tax involved, the federal tax form number, and the specific year(s)/period(s) involved. These items should generally all be included to create a valid power of attorney under that Treasury Regulation. See IRM Sub-Section 39.1.10.3(d), IRM Exhibit 39.1.10-3 and Instructions for Form 2848.

Therefore, if the taxpayer wishes to use [REDACTED] as an attorney-in-fact, Form 2848, "Power of Attorney and Declaration of Representative," which allows a corporation to appoint an agent or attorney in fact to act on its behalf, may be used. The Service will accept a power of attorney other than Form 2848 as

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<sup>4</sup> The term "agent" is used as a synonym for attorney-in-fact.

long as the other requirements listed in Treasury Regulation § 601.503(a) are met. Treas. Reg. § 601.503(b). Two separate powers of attorney should be filled out, one for the [REDACTED] and the other for [REDACTED]. Although not a recommended general practice, in this case, since [REDACTED] has already signed the Forms SS-10, those forms can be used if the taxpayer can provide properly completed power of attorney forms (preferably Form 2848) naming [REDACTED]. See Robert N. Ryan v. Commissioner, TC Memo. 1991-49. Another option would be to have the taxpayer's Chief Financial Officer (or one of the other corporate officeholders named in Revenue Ruling 83-41) execute a new set of Forms SS-10.

Finally, we note that in a memorandum dated [REDACTED], the taxpayer argues that under the doctrine of collateral estoppel "any court" would uphold the validity of the waivers previously signed by [REDACTED]. Under the circumstances here present, it is possible for the Service to make a collateral estoppel argument concerning the validity of the previously signed statute extensions. However, the burden of proof with respect to such a collateral estoppel argument in Tax Court is upon the Service. See Tax Court Rules 142 and 39. We do not believe it advisable to rely upon the Service meeting such a burden where the possibly deficient pre-existing statute extensions can easily and timely be corrected, as described above.

We suggest that you explain to the taxpayer that questions exist as to the validity of the Forms SS-10 executed by [REDACTED]. To resolve these questions, counsel has advised you either to get new Forms SS-10 executed by one of the corporate officeholders named in Rev. Rul. 83-41 or to obtain Forms 2848 executed in favor of [REDACTED].

If you have any questions, telephone Murali Balachandran of our office at (212) 264-1595, ext. 330.

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By: \_\_\_\_\_  
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